No. 87-2127 (5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

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QUESTION PRESENTED

Did the district court err in declaring Section 630 of the Continuing Resolution for Fiscal Year 1988 unconstitutional under the doctrine of separation of powers on the ground that Congress has no authority to enact legislation that regulates the disclosure of national security information?

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*The plaintiffs in the district court (appellants in this Court) were the American Foreign Service Association, Representative Barbara Boxer, Representative Jack Brooks, Senator Charles Grassley, Senator David Pryor, Representative Pat Schroeder, Representative Gerry Sikorski, and Senator William Proxmire (whose term will expire in January 1989). The defendants below (appellees here) were Steven Garfinkel, Director of the Information Security Oversight Office, William H. Webster, Director of Central Intelligence, and George P. Shultz, Secretary of State.

In the district court, this case was consolidated with *National Federation of Federal Employees v. United States, Terence C. Golden, Steven Garfinkel, Frank Carlucci, John O. Marsh, Jr., Edward C. Aldridge, Jr., and James H. Webb, Jr.*, No. 87-2284-OG, and with *American Federation of Government Employees, AFL-CIO, Jim Stinchcomb, James Douglas and Louis C. Brase v. Steven Garfinkel, Terence C. Golden, Colin L. Powell, William Webster, Frank Carlucci, Edward C. Aldridge, John O. Marsh, Jr., James H. Webb, Jr., and United States*, No. 87-2412-OG. Those cases presented claims that were not finally disposed of until the district court's subsequent orders filed July 29, 1988 and September 26, 1988, and are currently on appeal to the United States Court of Appeals for the District of Columbia Circuit (appeals docketed, Nos. 88-5402 & 88-5404 (Nov. 17 & 22, 1988)).

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BRIEF OF APPELLANTS

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia are officially reported at 688 F. Supp. 671 (D.D.C. 1988), and are reproduced in the appendix to the jurisdictional statement (App. 1a-38a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on May 27, 1988, holding an Act of Congress unconstitutional and dismissing the complaint. App. 37a-38a. A notice of appeal was filed on June 3, 1988. App. 39a-41a. Because the district court declared an Act of Congress unconstitutional in a civil action to which officers of the United States were parties, this Court has jurisdiction under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 630 of the Continuing Resolution for Fiscal Year

1988, Pub. L. No. 100-202, 101 Stat. 1329-432 (Dec. 22, 1987), and the relevant constitutional provisions are set forth in appellants' jurisdictional statement. Section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (Sept. 22, 1988), which is identical to Section 630, is set forth in an addendum to this brief.

STATEMENT OF THE CASE

This appeal seeks reversal of a ruling that Congress violated the doctrine of separation of powers when it enacted a law limiting the use of certain terms in nondisclosure forms that Executive Branch employees are required to sign as a condition of obtaining access to classified information. In order to understand why that broad ruling of unconstitutionality cannot stand, it is necessary to review the nondisclosure agreement program that led to the passage of the statute, Congress' attempts to work out an accommodation with the Administration, the Executive Branch's violation of the statute, and the breadth of the claims raised by appellees and accepted by the district court.

A. The Nondisclosure Agreement Program.

In March 1983, adhering to the recommendations of an Executive Branch task force, President Reagan expanded the group of federal employees who must sign nondisclosure agreements, which generally forbid unauthorized disclosures of classified information, from only those in particularly sensitive positions to all individuals who are authorized to have access to any classified information. National Security Decision Directive-84 ("NSDD-84") ¶ 1(a) (Joint Appendix ("J.A.") 11).[1] He

[1]The task force's recommendations are contained in *Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information* (Mar. 31, 1982), which is reprinted in *Presidential Directive on the Use of Polygraphs & Prepublication Review: Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Judiciary Comm.*, Serial No. 114, 98th Cong., 1st & 2d Sess. 166, 169 (1983 & 1984) ("1983-1984 House Judiciary Comm. Hearing").

also directed all employees who have access to Sensitive Compartmented Information ("SCI") — the portion of classified information that involves or is derived from intelligence sources and methods — to sign nondisclosure agreements providing for prepublication review. J.A. 11-12. This obligation, which requires employees to submit writings related to classified information or intelligence activities for review prior to publication to ensure deletion of classified material, had previously applied only to employees of the intelligence-gathering agencies, such as the Central Intelligence Agency and the National Security Agency. *National Security Decision Directive 84: Hearing before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 20 (1983) ("1983 Senate Hearing") (Sen. Eagleton).

To carry out this directive, appellee Steven Garfinkel, the Director of the Information Security Oversight Office ("ISOO"), developed Standard Form 189 ("SF 189") and required federal employees who have access to classified, but not SCI, information, to sign it. 32 C.F.R. § 2003.20(b) (1987); J.A. 15-18. Similarly, the predecessor of appellee William Webster, the Director of Central Intelligence, who is responsible for protecting intelligence sources and methods under the National Security Act of 1947, 50 U.S.C. § 403(d)(3), implemented the directive by requiring federal employees who have access to SCI to sign a revised version of Standard Form 4193 ("SF 4193"). J.A. 19-25.

Although NSDD-84 and the Executive Branch task force that recommended these measures were concerned only with classified information, both SF 189 and SF 4193 forbid federal employees from divulging both classified and "classifiable" information to individuals who are not authorized to receive them. *Compare* J.A. 11-14 *and* 1983-1984 House Judiciary Comm. Hearings at 166-80 *with* J.A. 15, 19. The forms contain no definition of the term "classifiable," nor is the term defined in Executive Order 12,356, which sets forth the standards and

procedures governing the classification of information held by the Executive Branch, and which requires classified information to be marked with classification designations. Exec. Order 12,356, §§ 1.5, 6.1(c) (April 2, 1982), 50 U.S.C.A. § 401 note.[2]

In addition, while the forms are not explicit on the issue, the Administration has taken the position that employees who sign these forms agree not to disclose classified or "classifiable" information to Congress without prior authorization, even if the employee is otherwise entitled to give the information to Congress. Appellees' Motion to Affirm at 15, 22, 23 n.22, 24, 26-27; J.A. 37; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). In other words, Executive Branch employees are forbidden from providing information to Members of Congress until their superiors decide that the Member in question has a need to know the information, even though previously Members of Congress were deemed to be authorized to receive classified information. Like the term "classifiable," this interpretation has no basis in NSDD-84, which makes no mention of congressional disclosures, J.A. 11-14, or in Executive Order 12,356, which requires only that, where classified information is disseminated outside the Executive Branch, it shall be done under conditions that ensure that it will be given equivalent protection. Exec. Order 12,356, § 4.1(c).

Employees who decline to sign these secrecy forms or who violate their terms risk losing their security clearances and, in many cases, their jobs, which require such clearances, even if their actions do not violate Executive Order 12,356, or are otherwise authorized by law. J.A. 16, 21. As of December 31, 1987, about 2.5 million current and former government employees had signed SF 189, and about 453,000 current and former employees, excluding CIA and NSA employees, had signed SF

[2]Documents awaiting a classification determination may be treated as though they are classified for a thirty day period while they are undergoing review, Exec. Order. 12,356, §§ 1.1 (c) and 1.2(e), and it is common practice to mark such documents with an interim classification designation.

4193 or its equivalent. *Congress & the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Gov't Operations,* 100th Cong., 2d Sess. 156-66, 170-71, 187 (1988) ("1988 Hearing") (General Accounting Office testimony). Thus, approximately three million individuals, or more than one half of the combined federal civilian and military workforce, are bound by these forms. *Id.*; General Accounting Office, *Information & Personnel Security: Data on Employees Affected by Federal Security Programs* 10 (Sept. 1986) ("1986 GAO Report").

B. Response of Congress and Federal Employees to the New Nondisclosure Forms.

From their inception, the new nondisclosure forms have been the subject of extensive criticism and scrutiny by Congress. Thus, in 1983-1984, Congress condemned the expansion of prepublication review clauses beyond the intelligence-gathering agencies in several hearings, committee reports, a rider cutting off funds for implementation of the program for five months, and a bill approved by two House committees which would have permanently limited such agreements.[3] Shortly after the Executive Branch released its revised SCI agreement in August 1983, several Senators assailed the vagueness of the terms "classifiable" and "subject to classification," on the ground that employees could not know whether particular information came within such broad terms. 1983 Senate Hearing at 13-14, 20, 39-40 (Sen.

[3]*See Review of the President's National Security Decision Directive 84 & the Proposed Department of Defense Directive on Polygraph Use: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 1st Sess. (1983); 1983 Senate Hearing, *supra* at 3; 1983-1984 House Judiciary Comm. Hearing, *supra* at 2 n. 1; Comm. on Gov't Operations, *The Administration's Initiatives to Expand Polygraph Use & Impose Lifelong Censorship on Thousands of Government Employees*, H.R. Rep. No. 578, 98th Cong., 1st Sess. 20-21 (1983) ("1983 House Report"); H.R. Rep. No. 961, 98th Cong., 2d Sess. (1984) ("1984 House Report"); Department of State Authorization Act for Fiscal Years 1984 & 1985, Pub. L. No. 98-164, § 1010, 97 Stat. 1017, 1061 (1983); H.R. 4681, 98th Cong., 2d Sess. (1984), *in* 1984 House Report at 1-4.

Eagleton); *id.* at 16-17 (Sen. Levin). In the face of this legislative opposition, the Administration agreed to suspend the portion of NSDD-84 that requires all employees with access to SCI to sign prepublication review forms for the remainder of the 1984 session in order to enable Congress and the Executive Branch to work together to devise a means to prevent unauthorized disclosures of classified information. 1984 House Report at 55-56. After the end of that session, however, the Administration again required all employees outside the CIA and NSA who have access to SCI to sign SF 4193, which requires prepublication review. House Comm. on Government Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Rep. No. 911, 100th Cong., 2d Sess. 5 (1988) ("1988 House Report"); 1986 GAO Report at 2.

Many employees refused to sign the standard forms because the term "classifiable" is so broad and vague. After many such refusals and numerous complaints from Members of Congress, appellee Garfinkel published two clarifications in the Federal Register, which limited that term in SF 189, but in no other forms, to information that meets the requirements for classification set forth in Executive Order 12,356, but has no classification markings as a result of time constraints, negligence, error, lack of opportunity, or oversight. 52 Fed. Reg. 28,802 (Aug. 3, 1987) & 52 Fed. Reg. 29,793 (Aug. 11, 1987). Because many federal employees were still concerned that they would be unable to determine with any degree of certainty whether particular information is covered by their nondisclosure agreements, several employees and their union representatives filed two separate lawsuits challenging the standard forms, primarily on vagueness grounds. *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C., filed August 17, 1987); *American Federation of Government Employees, AFL-CIO v. Garfinkel*, No. 87- 2412-OG (D.D.C., filed September 1, 1987). Subsequently, at an October 1987 hearing of the House Subcom-

mittee on Human Resources, appellee Garfinkel further defined "classifiable" as information that the employee knows or reasonably should know is "unmarked information that already is classified, or meets the standards for classification and is in the process of being classified." *Classified Information Nondisclosure Agreements: Hearing Before Subcomm. on Human Resources of the House Comm. on Post Office & Civil Service*, Serial No. 100-37, 100th Cong., 1st Sess. 78-79 (1987) ("1987 Hearing").

Even with this last modification, appellee Garfinkel's clarifications did not allay congressional concerns, as Representative Gerry Sikorski made clear at the beginning of that hearing:

> Despite the recent regulations issued by the ISOO and the various sometimes inconsistent versions or definitions that Mr. Garfinkel of the ISOO has propounded in letters to this committee and to others in Congress, the definition of "classifiable" is still threateningly vague and all-encompassing.
>
> Employees must speculate about what information may or may not be classified. Classifiable still can be, as Mr. Garfinkel once honestly declared, just about anything.

Id. at 1-2. Senator Charles Grassley highlighted the flaws in the use of these terms:

> How does one then know when information is classified? The answer is that it is marked "classified."
>
> How does one know when something is classifiable? The answer is that one cannot know. The term is so broad and undefinable that it could supplant the term "loitering" as a textbook example of vagueness for first year law school classes.

Id. at 9. Thus, according to Representative Sikorski:

> Federal employees place their jobs on the line whenever they release *any* information — whether or not it was actually marked classified at the time of the release. They risk civil and criminal sanctions against them. The chilling effect is obvious as a Minnesota January.

Id. at 5 (emphasis in original); *id.* at 22 (Rep. Brooks) ("anything that somebody said they do not like would be 'classifiable'").

Representative Barbara Boxer also cautioned that the term "classifiable" allows retroactive classification after information has been disclosed in order to punish whistleblowers for making disclosures that embarrass their superiors. *Id.* at 14; J.A. 34. Senator Grassley echoed the concerns raised in an opinion of the Congressional Research Service that the standard forms are "a back-door way of going beyond the laws passed by Congress," particularly the whistleblower protection provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8). 1987 Hearing at 9-10, 157-64. Finally, several Members protested the applicability of the forms' prior authorization requirement to congressional disclosures because it deters disclosures of both classified and "classifiable" information that Congress needs to perform its duties, but which executive officials may prefer to keep hidden. *Id.* at 14 (Rep. Boxer); *id.* at 16 (Rep. Sikorski); J.A. 34, 35 (Rep. Boxer); *id.* at 37 (Sen. Grassley).[4]

After negotiations between Congress and the Executive Branch broke down, Senator Grassley characterized the forms as an attempt by the Administration "to go way beyond the legitimate protection of classified information . . . to place a blanket of

[4]Not only does the Executive Branch require prior authorization before employees disclose information to Congress, but some Executive Branch officials have asked Members of Congress to sign SF 189 before receiving classified documents, including in one instance where the document was prepared by the General Accounting Office, an arm of Congress. *Id.* at 22-25 (Rep. Brooks); *id.* at 13 (Rep. Boxer); J.A. 36.

silence over all information generated by the government . . . [which] begs to be addressed immediately by the Congress." *Id.* at 8; *see also id.* at 10; J.A. 37. Thus, in order to facilitate more productive negotiations or the passage of permanent legislation, he urged Congress to pass a law outlawing the use of the current forms. 1987 Hearing at 10, 12.

C. Section 630 and Appellees' Noncompliance With It.

In the wake of the failed negotiations, Congress passed a law, which became effective on December 22, 1987, barring the use of funds during Fiscal Year 1988 to implement the existing forms or to enforce certain of their provisions. Section 630, Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). The pertinent provision, Section 630, prohibits the Executive Branch from spending any funds during Fiscal Year 1988 to implement, *i.e.*, have employees sign, SF 189 and SF 4193, or other nondisclosure agreements that violate any of five discrete prohibitions or to enforce during that year any such provisions contained in agreements previously signed.

The first two subsections of Section 630 forbid the use of the term "classifiable" and restrict nondisclosure agreements to information that is specifically marked classified or that the employee *knows* is either classified or in the process of a classification determination. The next two subsections provide that nondisclosure agreements may not, by a requirement of prior written authorization or otherwise, obstruct the right of any individual to petition or communicate with Members of Congress in a secure manner, as provided by the rules and procedures of Congress, or limit the right of Congress to obtain Executive Branch information under such rules and procedures. The final subsection, which overlaps to a considerable degree with Section 630's other provisions, forbids nondisclosure agreements from imposing obligations or invoking remedies that are inconsistent with statutory law, such as whistleblower protections.

However, Section 630 expressly allows enforcement of those aspects of nondisclosure agreements that do not fall within any of its specific prohibitions.

According to the Conference Report, Section 630's purpose "is to address serious concerns of the Congress about the obligations imposed on government employees by nondisclosure agreements . . .." H. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). In particular:

> These agreements, which are imposed by the executive branch without any explicit statutory authority, create obligations for these employees to safeguard not only information which is properly classified pursuant to executive order, but any information which may be considered to be "classifiable." This overbroad and ambiguous language results in a chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.

Id. The moratorium imposed by Section 630 was intended to enable Congress "to examine the entire issue of nondisclosure agreements, including prepublication review, and make appropriate responses to executive branch policy in this area as needed." *Id.*; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (floor statement of Rep. Brooks) ("This provision places a moratorium on the administration's use of various nondisclosure agreements for a year so that Congress may review them").

Although the President signed the Continuing Resolution without noting any objection to Section 630, the Executive Branch did not comply with it. Despite the fact that appellee Garfinkel directed agencies to cease requiring employees to sign SF 189 agreements until further notice, J.A. 28-29, 30, at least 43,000 SF 189 agreements were executed between December 22, 1987 and March 31, 1988. 1988 Hearing at 166, 173, 188

(GAO Testimony). Recognizing that agencies had violated Section 630's implementation ban, appellee Garfinkel directed them to take reasonable steps to notify employees that SF 189 agreements signed after December 22, 1987 are voidable at the employee's request. J.A. 29, 32. However, because he did not require agencies to void post-December 22 agreements in the absence of a request from the employee, employees had to take affirmative steps identifying themselves to their superiors in order to obtain the benefits of Section 630. J.A. 29, 32-33. Nor did he require agencies to notify those who had signed agreements before December 22, 1987 that Section 630 significantly altered the effect of those agreements. J.A. 28-33.

Appellee Webster, who had never adopted any limiting definitions of the term "classifiable," did even less to comply with Section 630. Thus, he instructed agencies to continue using SF 4193 and other forms that contain the provisions banned by Section 630, and merely to attach an addendum that consists solely of the following sentence:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

J.A. 26-27. The addendum does not identify the section of the Continuing Resolution setting forth the restrictions, despite the fact that Section 630 occupies less than one page of a 450-page bill that has no index to assist in locating a section on a particular subject matter. Pub. L. No. 100-202, 101 Stat. 1329. As a result, approximately 5000 employees signed SF 4193 or its equivalent during the Section 630 ban, with only the addendum giving them any hint that it might be less than fully enforceable. 1988 Hearing

at 166, 173, 188 (GAO Testimony).

D. This Lawsuit.

On February 18, 1988, appellant American Foreign Service Association ("AFSA"), a professional and labor association of foreign service employees whose members have been required to sign SF 189 and SF 4193 both before and after December 22, 1987, and seven Members of Congress, who depend on access to national security information furnished by federal employees in order to carry out their duties (the "congressional appellants"), filed this lawsuit in the United States District Court for the District of Columbia to compel appellees Garfinkel, Webster, and Secretary of State George P. Shultz to comply with Section 630. J.A. 5. Jurisdiction was based on 28 U.S.C. § 1331, and the case was assigned to the same judge who was hearing the earlier cases, in which the congressional appellants had filed an *amicus* brief. Appellants sought a preliminary injunction to prevent appellees from requiring federal employees to sign the prohibited non-disclosure agreements during the remainder of Fiscal Year 1988. J.A. 1, 10. They also asked the court to require appellees to treat all agreements signed on or after December 22, 1987 as void and to notify the employees who signed such agreements that they are unenforceable. J.A. 10. Subsequently, in order to remove the chill imposed by the unenforceable portions of the pre-December 22 agreements, appellants asked the court to require that all federal employees who signed the forms before December 22, 1987 be notified that the terms listed in Section 630 could not be enforced during the funding ban. J.A. 3, 10.

In their opposition to these motions, appellees pointed to the steps that they had taken to meet what they described as the "principal concerns" expressed in Section 630. However, recognizing that their actions fell far short of full compliance, appellees also challenged the constitutionality of Section 630 under

the doctrine of separation of powers. To support their claims, appellee Webster submitted a general affidavit asserting that disclosures of SCI may harm national security and that nondisclosure agreements generally help prevent such disclosures — two points that appellants have never challenged, but which in no way support appellees' broad claim of unconstitutionality. J.A. 40-44. Neither that affidavit nor any other evidence in the record even asserts that any of the provisions that are banned by Section 630 are necessary to prevent the disclosure of SCI or other classified information, let alone that their deletion will render the nondisclosure forms ineffective. *Id.*

In a memorandum opinion issued on May 27, 1988, Senior District Judge Oliver Gasch agreed with appellants that appellees had violated Section 630's ban on the execution of additional SF 4193 agreements and that appellee Webster's addendum did not constitute compliance with Section 630. App. 22a-23a & n.16. However, he then held Section 630 unconstitutional in all its applications under the doctrine of separation of powers, despite the lack of evidence of any harm from Section 630's terms. App. 27a. Although the court recognized that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information," App. 25a, it nonetheless concluded that Section 630 departs from Congress' historical role, which the court viewed as limited to "facilitat[ing] secrecy with appropriate criminal and civil sanctions," and seeking information by subpoena or cooperation. App. 26a.

Instead of discussing the provisions of Section 630 that appellees had clearly violated, the court focused exclusively on subsections 3 through 5, which it read to "permit the President to ensure the secrecy of national security information only by those means authorized by Congress." App. 26a-27a. Based on this erroneous construction, and without citing a single case in which a comparable statute had been found to be beyond Congress'

powers, the court declared Section 630 unconstitutional on its face because it "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." App. 27a.[5]

E. Post-Decision Developments: Rulings in the Companion Cases and Renewal of Section 630.

Subsequently, on July 29, 1988, the district court ruled in the companion cases that the term "classifiable" is unconstitutionally vague because it "has no readily discernible meaning" on its face. Motion to Affirm at 17a, 23a ("*NFFE/AFGE*"). However, the court concluded that the constitutional infirmity could be remedied if "classifiable" is defined in accordance with the last definition offered by appellee Garfinkel at the October 1987 congressional hearing. *Id.* at 18a-19a. Under that definition, which Congress had rejected in enacting Section 630, "classifiable" refers to information that the employee knows or "reasonably should know" is either classified, even though it is unmarked, or unclassified, but meets the standards for classification and is in the process of being classified. *Id., quoting* 52 Fed. Reg. 48,367 (Dec. 21, 1987) (to be codified at 32 C.F.R. § 2003.20(h)(1)). Accordingly, the court ordered the defendants to notify employees either that the term "classifiable" is stricken from the forms or that it is defined in accordance with the narrowing definition, in which case the forms' ban on disclosures of "classifiable" information could be enforced against the employee. Motion to Affirm at 20a, 23a; J.A. 62-63.

[5]Appellees also challenged the standing of all the appellants. The district court found that appellant AFSA and the unions and individual plaintiffs in the companion cases have standing to seek compliance with Section 630, but that the congressional appellants do not. App. 13a-20a. In their jurisdictional statement, appellants included a question pertaining to congressional standing in order to preserve that claim. However, the Court need not reach that question because appellees have not challenged AFSA's standing. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

The defendants in *NFFE/AFGE* moved to amend the judgment to allow them more time to comply with the court's order and to permit them to notify employees by publishing the Garfinkel definition in the Federal Register. On September 26, 1988, the district court denied this motion in large part, but amended its order to allow the defendants an additional 30 days in which to provide personal notice to the signatories that the term "classifiable" was either deleted or defined in accordance with the court's July 29, 1988 opinion. J.A. 64-65. The government is not appealing, but the *NFFE/AFGE* plaintiffs are appealing on the ground that the term "classifiable" is still unconstitutionally vague, even under the narrowing definition.

After the district court's last ruling, appellee Garfinkel directed agencies to notify current, but not former, employees of the narrowing definition of the term "classifiable." 53 Fed. Reg. 38,278 (Sept. 29, 1988); Motion to Affirm at 13. However, under appellee Garfinkel's notice, employees violate the nondisclosure agreement not only if they know, but also if they "reasonably should know," that the information fits within one of these categories, despite the fact that subsection 1 of Section 630 requires actual knowledge. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(h)(1)-(3)). Although appellee Webster has not published his directions in the Federal Register, he has represented to this Court that he has issued a similar notice with respect to SF 4193. Motion to Affirm at 13. Furthermore, appellees Webster and Garfinkel have both approved new standard forms that delete the term "classifiable," in keeping with subsection 2 of Section 630, but which recite in its place portions of the definition approved in *NFFE/AFGE* and make no changes to ensure that employees' rights to provide information to Congress are not limited by a prior authorization requirement. 53 Fed. Reg. at 38,278-80; J.A. 54-58, 66-70. Finally, appellee Garfinkel has published a final rule declaring that his nondisclosure forms "do not supersede . . . any other laws of the United

States," but he has not notified employees of this limitation, nor has he included it in his revised form. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)).

Toward the end of Fiscal Year 1988, a Subcommittee of the House Committee on Government Operations held a hearing on the nondisclosure agreement program at which Members of Congress stressed the importance of Section 630's requirement that employees have actual knowledge that information is covered by the agreements and criticized the requirement that employees must obtain prior authorization before providing information to Congress. 1988 Hearing at 21, 37 (Rep. Boxer); *id.* at 48-49, 67, 72-73, 75-76 (Sen. Grassley), *id.* at 5-6, 8, 10-13 (Sen. Proxmire); *id.* at 40 (former Sen. Mathias); *see also* 1988 House Report at 19-21. Moreover, pointing to the Executive Branch's reliance on the district court's decision to thwart a pending military whistleblower protection bill, several Members urged Congress to re-enact Section 630 in order to facilitate this Court's review of the decision. 1988 Hearing at 14-15, 18-20, 25-27 (Rep. Boxer); *id.* at 67, 76 (Sen. Grassley).

Following these suggestions, Congress renewed Section 630 by including it, as Section 619, in the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721 (1988). In signing that bill, President Reagan noted his constitutional objections to Section 619, and stated:

> In accordance with my sworn obligation to preserve, protect, and defend the Constitution, section 619 will be considered of no force or effect unless and until the ruling of the District Court is reversed by the Supreme Court.

24 Weekly Comp. Pres. Docs 1189 (Sept. 22, 1988). Because Sections 630 and 619 are identical, except for the year in which they are in effect, we refer to them collectively as Section 630.

SUMMARY OF ARGUMENT

The district court's decision is fundamentally flawed because it overlooks the significant national security powers granted to Congress by the Constitution and vastly overstates those of the Executive Branch. Moreover, under *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the district court's sweeping declaration that Section 630 is unconstitutional in every conceivable application cannot stand because Congress plainly has the power to enact such a limited measure, and there is absolutely no evidence that it impairs the Executive Branch's ability to carry out its constitutional functions.

The first part of Section 630 curbs the use of terms that Congress deemed to be vague and overbroad. Thus, it prohibits the use of the term "classifiable" and spells out the categories of information that are not marked classified but may still be covered by the forms. This aspect of Section 630 does not offend separation of powers because it is tied to the Executive Branch's own classification standards and there is no evidence that it interferes in any way with the Executive Branch's functions. The lack of any unconstitutional interference is underscored by the fact that the term "classifiable" has been declared unconstitutionally vague, that most agencies have complied with the bulk of Section 630's definition, and that one agency has complied with it in its entirety.

Section 630 also prohibits nondisclosure forms from restricting, through a prior authorization requirement, the constitutional and statutory rights that federal employees have to communicate with Congress and that Congress has to obtain Executive Branch information. Since it is the Constitution and other statutes, not Section 630, that establish the underlying rights that employees have to communicate with Congress, Section 630 simply preserves the status quo by forbidding nondisclosure forms from requiring employees to obtain advance permission to disclose

information that they otherwise have a right to convey to Congress. Moreover, the sole relief sought with respect to these provisions consists of notice to those who have signed the forms that the prior authorization requirement cannot be applied to protected congressional disclosures during the funding ban. Since appellee Garfinkel concedes that the nondisclosure forms do not and cannot supersede other laws, and Section 630 merely protects rights under such other laws, providing this notice will not impair the Executive Branch, contrary to the holding of the district court.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY HELD THAT SECTION 630 IS UNCONSTITUTIONAL IN EVERY CONCEIVABLE APPLICATION.

A. Appellees Have Not Complied With Section 630.

Before reaching the constitutional question, this Court must conclude, as did the district court, that appellees have failed to comply with Section 630. In this regard, appellees have never claimed that they have fully complied with Section 630's requirements. Instead, they have asserted only that they "took steps to accommodate certain of the concerns reflected in Section 630" and these actions "meet the principal concerns that led to the enactment of Section 630." Motion to Affirm at 8, 14.

As the district court correctly found, albeit in somewhat equivocal language, appellees violated Section 630's ban on the use of funds to implement or enforce SF 189 and SF 4193. App. 22a-23a n.16. Thus, the court concluded that the Director of Central Intelligence violated Section 630 by continuing "to require execution of the [SF 4193] form until March 22, 1988 . . .," and that "[t]he addendum to SF 4193, which purports to cleanse the agreement of provisions offensive to section 630,

plainly is not 'true to the congressional mandate from which it derives its authority,' and is based on an 'erroneous view of the law' as Congress has written it." *Id.* (citations omitted).

The district court's conclusion that appellees violated Section 630 is unassailable. First, by simply making an opaque reference to a single section of a 450-page law, appellee Webster's addendum to SF 4193 does not comply with Section 630's express prohibition on the continued use of SF 4193. Second, some agencies required employees to sign SF 4193 or its equivalent without any such addendum, and third, many did not stop using SF 189 until well into Fiscal Year 1988.[6] Indeed, after Section 630 became effective, eighteen agencies required approximately 43,000 employees to sign SF 189 and 6000 more to sign SF 4193 or its equivalent. 1988 Hearing at 166, 173 (GAO Testimony).

Not only were appellees in violation of Section 630 when the district court issued its ruling, but their subsequent actions have reaffirmed their unwillingness to abide by Section 630's requirements. Although appellees Garfinkel and Webster have approved new standard forms that omit the term "classifiable," in compliance with subsection 2, these forms do not comply with subsection 1. That provision limits nondisclosure agreements to information that is "specifically marked as classified" or "unmarked but known by the employee to be [either] classified" or "in the process of a classification determination." In other words, Section 630 requires that employees have actual knowledge that unmarked information is covered by the forms. In contrast, the new standard forms apply to unmarked information that is classified or in the process of a classification determination, without requiring that the employee know of that fact, J.A.

[6]Department of the Navy's Answer to Interrogatory No. 1 (Docket Entry No. 3); Supplemental Responses of Departments of Defense, the Army, the Navy, and the Air Force to Plaintiffs' Interrogatory No. 6 (filed March 15, 1988 in lead case, No. 87-2284-OG, after consolidation).

54, 66, and appellee Garfinkel has published a final rule, stating that employees will be held liable if they "reasonably should know" that information falls within one of these categories. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(h)(3)). Moreover, despite subsections 3 and 4, the revised forms contain the prior authorization requirement that appellees construe to apply to disclosures that employees have a right to make to Congress. J.A. 54-55, 66-67. In addition, although appellees provided notice of the definition of "classifiable" to current employees, that definition falls short of subsection 1 for the reasons set forth above, and they did not provide any notice to former employees, who are bound forever by the agreements, thereby leaving them to speculate as to what information they may disclose.

Even if appellees had complied with Section 630, which they have not, they have made it clear that they do not feel bound to do so. Thus, the President has "directed that . . . Section 619 [630] will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case. . .." Motion to Affirm at 14, *citing* 24 Weekly Comp. Pres. Docs. 1189. Accordingly, this Court must reach the constitutional question presented by the district court's sweeping ruling.[7]

B. The District Court's Decision Seriously Misstates the National Security Powers of Congress and the Executive Branch.

The district court declared Section 630 unconstitutional on the ground that it infringes on inherent presidential powers, without any evidence that Section 630 actually impairs the Executive Branch's ability to protect national security information. This

[7]In its motion to affirm at 14-15, 18-20, appellees argued that this case had become moot. We disagree for the reasons set forth above and in our opposition to the motion to affirm. However, if the Court decides that the case is moot, it should vacate the district court's opinion. *United States* v. *Munsingwear*, 340 U.S. 36 (1940).

sweeping ruling strikes down Section 630 in every conceivable manifestation in disregard of the presumption of constitutionality that attaches to duly enacted laws, *see Bowen v. Kendrick*, 108 S. Ct. 2562, 2578-79 (1988). In addition, the district court violated its obligation to formulate a rule of law no broader than necessary to decide the issues before it, or than is warranted by the precise facts of the case, *see Garner v. Louisiana*, 368 U.S. 157, 163 (1945). The decision further departs from the cautious approach followed by this Court when reviewing facial challenges to statutes, especially those asserting violations of the doctrine of separation of powers, where some showing of actual impairment to the constitutional functions of a branch of government is required. *See Morrison v. Olson*, 108 S. Ct. 2597, 2614 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) ("*Nixon v. GSA*").

Where Congress and the Executive Branch have shared responsibilities, and Congress' action does not contravene any express constitutional provision, this Court has applied a pragmatic balancing test to determine whether the action of one branch unduly impinges on the province of the other:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. GSA, 433 U.S. at 441, 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)); *accord Morrison v. Olson*, 108 S. Ct. at 2616, 2621; *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851-52 (1986). However, the district court

never engaged in that balancing process because it assumed that only the Executive Branch has the constitutional power to regulate national security information, which would call into question countless other statutes in addition to Section 630. *See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811; Classified Information Procedures Act, 18 U.S.C. App.§§ 1-16; Freedom of Information Act, 5 U.S.C. § 552(b)(1). In adopting this approach, the district court erred both in making that unprecedented assumption and in consequently failing to apply the controlling test.

1. Congress Has Extensive Powers That Enable It To Regulate National Security Information.

In ruling that the President's inherent powers disable Congress from regulating the disclosure of national security information, the district court completely overlooked Congress' constitutional role in national security and appropriations matters. The Constitution assigns Congress specific enumerated powers relating to national security, such as the powers "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" to "provide for the common Defence;" "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;" "to raise and support Armies;" "to provide and maintain a Navy;" "to make Rules for the Government and Regulation of the land and naval Forces;" to exercise exclusive authority over property acquired "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;" and "to provide for organizing, arming, and disciplining the Militia," and "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cls. 1, 10-17.

The war power, in particular, implies expansive peacetime powers including the establishment of "compulsory military

service, control of activities related to atomic energy, [and] comprehensive security programs affecting millions of employees of the federal government and of government contractors." L. Henkin, *Foreign Affairs and the Constitution* 71-72 (1972) (footnote omitted). Congress also has the power "to regulate Commerce with foreign Nations," to "regulate the Value . . . of foreign Coin," and "to establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8, cls. 3-5. And the Senate's power to pass on treaties and appointments of ambassadors and other officers who deal with national security and foreign affairs matters gives it considerable authority in numerous aspects of foreign affairs. *See* U.S. Const. art. II, § 2, cl. 2. In all of these respects, the Constitution assigns Congress substantial powers that directly bear on national security matters.

Aside from its specific national security powers, Congress is the repository of all legislative powers, including the power to make all laws that are necessary and proper for carrying out its powers and the powers of the entire United States government, U.S. Const. art I, §§ 1 & 8, cl. 18, as well as the power to tax and spend for the general welfare, art. I, § 8, cl. 1. *See United States v. Butler*, 297 U.S. 1, 65-66 (1935). Congress also has expansive authority through the power of the purse, U.S. Const. art. I, § 9, cl. 7, which James Madison characterized as the "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *The Federalist* No. 58, at 380 (E. Earle ed. 1937); *id.* No. 48, at 323 (J. Madison) (power of the purse makes other branches dependent on Congress). Finally, Congress' power of impeachment, which extends to all officers of the United States, not just to the President, provides the ultimate check on executive actions. U.S. Const. art. I, § 2, cl. 5 & § 3, cl. 6.

These powers provide Congress ample authority to regulate

access to national security information held by the Executive Branch. *See Nixon v. GSA*, 433 U.S. at 445 (legislative regulation of Executive Branch documents has "never been considered invalid as an invasion of [Executive Branch] autonomy"); *EPA v. Mink*, 410 U.S. 73, 83 (1973) (construing the Freedom of Information Act exemption for classified information and stating "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures — subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.")

It is also unquestionable that Congress has the power to regulate the relationship between the Executive Branch and its employees. *See, e.g.*, Civil Service Reform Act of 1978, 5 U.S.C. §§ 2302-2303 (prohibited personnel practices); *Bush v. Lucas*, 462 U.S. 367, 379-84, 389 (1983) (Congress has authority to prescribe remedies for violations of federal employees' First Amendment rights and other improper personnel actions). Moreover, this power does not end merely because national security may enter into the equation. *See, e.g., Cole v. Young*, 351 U.S. 536, 544-48 (1956) (power to limit Executive Branch authority to terminate employees for national security reasons to positions directly concerned with national security matters). Furthermore, in several recent cases, this Court has construed statutes to determine whether employees may obtain administrative or judicial review of adverse security clearance determinations. *Carlucci v. Doe*, 57 U.S.L.W. 4025 (U.S. Dec. 6, 1988) (No. 87-751); *Webster v. Doe*, 108 S. Ct. 2047 (1988); *Department of the Navy v. Egan*, 108 S. Ct. 818 (1988). It would be wholly unnecessary to engage in such statutory construction if Congress could not constitutionally pass legislation in the area.

Given Congress' broad legislative and appropriations powers, it is presumed to have broad power to pass legislation, including in the area of national security, provided that the law does not

violate an express constitutional provision or prevent the President from carrying out his constitutional functions. *Nixon v. GSA*. Neither appellees nor the district court have pointed to any specific constitutional provision that prevents Congress from regulating national security information. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (Appointments Clause, U.S. Const. art. II, § 2, cl. 2); *Ex Parte Garland*, 71 U.S. 366 (1867) (presidential pardon power, U.S. Const. art. II, § 2, cl. 1). Nor have they made any showing that Congress' action actually prevents the Executive Branch from performing its constitutionally assigned functions. Instead, they construe the President's general powers as chief executive and commander-in-chief to give the Executive Branch exclusive authority over national security matters, even though this Court has never struck down a duly enacted statute based on these general powers.

2. The Executive Branch's National Security Powers, Though Important, Are Limited By Both The Constitution And Actions Of Congress Pursuant To Its Constitutional Powers.

Although the President has broad authority over national security matters, his powers are circumscribed by both the Constitution and Congress' coordinate role. Without addressing either Congress' power or the limits imposed on the President by the Constitution, the district court held that the Executive Branch's power over national security information precludes Congress from regulating that field at all. The principal case cited in support of such a claim is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which concerned a challenge to a congressional delegation to the President of the power to forbid certain arms sales if he found that such a ban would promote peace. In rejecting an undue delegation challenge, the Court observed that Congress could delegate broader powers to the President in the field of foreign affairs than it could in the

domestic arena. 299 U.S. at 321-22. Although Justice Sutherland's opinion speaks in *dicta* of plenary and inherent presidential powers over foreign affairs, Justice Jackson's seminal opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2, 646-47 (1952), subsequently construed *Curtiss-Wright* to mean only that "the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *See also id.* at 587-88 (rejecting claims of inherent presidential power to seize steel mills).[8]

Similarly, in *Nixon v. GSA*, the Court turned aside former President Nixon's separation of powers challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C.§ 2111 note (the "Materials Act"). At the outset, the Court rejected the contention that the mere regulation of the presidential materials, including many relating to national security matters, "constitutes, without more, a violation of the principle of separation of powers." 433 U.S. at 441. Instead, applying a flexible balancing test, the Court held that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." *Id.* at 445. In support of this conclusion, the Court pointed to the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," which "has never been considered invalid as an invasion of [Executive Branch] autonomy." *Id.* at 445 (*citing*, e.g., the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and the Government in the Sunshine Act, 5 U.S.C. § 552b).

Likewise, *Youngstown* establishes that Congress has ample authority to impose restraints on most presidential national security powers. That case arose when President Truman di-

[8]Much of the authority relied on by Justice Sutherland for an exclusive presidential role in foreign affairs has subsequently been controverted. *See, e.g.*, Lofgren, *United States v. Curtiss-Wright Export Corp.: An Historical Reassessment*, 83 Yale L.J. 1, 24-28, 30-31 (1973).

rected the Secretary of Commerce to seize and operate the steel mills in order to avert a nationwide strike in the steel industry, which, he concluded, would imperil weapons production for the Korean War. In an opinion written by Justice Black, the Court held the seizure orders invalid because Congress had not given the President the power to seize the steel mills, and the President therefore lacked such authority, even under his constitutional powers as chief executive and commander-in-chief. 343 U.S. at 586-89.

It is Justice Jackson's oft-cited concurring opinion that establishes the framework for evaluating presidential powers in the face of congressional restrictions. *Id.* at 635. Thus, although the President's authority is at its maximum when he acts pursuant to an express or implied authorization of Congress, it is weaker in the "zone of twilight in which he and Congress may have concurrent authority." *Id.* at 635, 637. In the latter situation, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id.* at 637. However, in contrast to presidential actions founded on congressional authorization or acquiescence, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* Since courts can sustain such claims of presidential power "only by disabling the Congress from acting upon the subject," Justice Jackson warned, "[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637-38 (footnote omitted).

In the national security area, this Court has never upheld an Executive Branch action that violated a specific act of Congress. Instead, it has upheld only those Executive Branch actions that

are expressly or impliedly authorized by congressional action or acquiescence. Thus, the Court's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which credited Justice Jackson's *Youngstown* framework with "bring[ing] together as much combination of analysis and common sense as there is in this area," *id.* at 661, upheld one aspect of the challenged executive agreements because it was expressly authorized by statute. *Id.* at 669-70, 673-74. Although that express authorization did not extend to the suspension of claims pending in United States courts, the Court implied congressional authorization for the remainder of the executive agreements based on congressional acceptance of, and acquiescence in, executive claims settlement. *Id.* at 677-81. Likewise, in *Regan v. Wald*, 468 U.S. 222 (1984), and *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court determined that Congress had authorized the Executive Branch to impose the challenged limitations on travel by United States citizens. And in *Haig v. Agee*, 453 U.S. 280 (1981), the Court held that, through longstanding congressional acquiescence, Congress had authorized the Executive Branch to revoke passports in the interest of national security.

On the other hand, where Congress has denied authorization to the Executive Branch to carry out certain actions, the Court has rejected claims of executive power that accordingly fall within *Youngstown's* "lowest ebb." For example, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Executive Branch claimed that it had inherent authority to restrain the publication of the Pentagon Papers. In a *per curiam* opinion, the Court held that the First Amendment bar on prior restraints precluded the issuance of the requested injunction. *Id.* at 714. Five of the six concurring Justices also dismissed the broad claim of presidential power because Congress had failed to give the President such power and had explicitly rejected legislation that would have delegated this authority to the President. *Id.* at 732-33, 740 (White, J., joined by Stewart, J., concurring); *id.* at 741-

47, 742 (Marshall, J., concurring) ("It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."); *see also id.* at 718 (Black, J., joined by Douglas, J., concurring); *id.* at 720-23 (Douglas, J., joined by Black, J., concurring).

Long before *Youngstown*, the Court ruled in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), that the Executive Branch had no authority in an undeclared war with France to seize ships that fell outside the terms of Congress' express authorization. Indeed, the Court held that a Navy official was personally liable for damages for seizing a ship in contravention of the statute, even though the seizure complied with orders issued by the Secretary of the Navy. Regardless of what authority the President might have had if Congress had been silent, once Congress acted, the Court observed, instructions issued by Executive Branch officials could not "legalize an act which, without those instructions, would have been a plain trespass." 6 U.S. at 177, 179; *see also Brown v. United States*, 12 U.S. (8 Cranch) 109 (1814) (declaration of war alone does not authorize Executive Branch to confiscate enemy property within the United States).

In *Little*, the Secretary of the Navy's orders went beyond the specific authorization granted to the Executive Branch by statute, and in *New York Times* and *Youngstown*, Congress had declined to authorize the action taken by the Executive Branch. Here, presidential power is at an even lower ebb because Congress has twice passed a statute expressly forbidding the Executive Branch from including certain terms in its nondisclosure forms. Because the Executive Branch's actions run counter to a much clearer and more emphatic expression of Congress' will, they are far more "vulnerable to attack" and "in the least favorable of possible constitutional postures." *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

Nonetheless, without even acknowledging this Court's re-

peated rejection of claims of unlimited presidential powers, and its recognition of Congress' ability to constrain such powers, the district court did precisely what this Court declined to do in *Nixon v. GSA*: it ruled that a duly enacted statute regulating Executive Branch information "constitutes, without more, a violation of separation of powers." 433 U.S. at 441. Given Congress' considerable authority over national security matters, and the Executive Branch's important, but not unlimited, corollary powers, it was plainly erroneous for the district court to decide this case without applying the *Nixon v. GSA* balancing test.

C. Section 630 Does Not Prevent the Executive Branch From Carrying Out its Constitutional Functions.

Under the *Nixon v. GSA* test, the Court must determine whether Section 630 "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and if so, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. GSA*, 433 U.S. at 441, 443. Since *Nixon v. GSA* establishes that the mere regulation of national security information does not disrupt the Executive Branch, the focus must be on the demonstrated harm, if any, that Section 630's specific provisions impose on the Executive Branch.

Section 630 regulates two aspects of nondisclosure forms. First, subsections 1 and 2 place discrete limits on the information that can be covered by such agreements. Second, subsections 3 and 4 prohibit the agreements from requiring employees to obtain prior authorization for disclosures to Congress, but only where the employee otherwise has a right to disclose the information to Congress, or Congress has a right to obtain it. Subsection 5, which forbids nondisclosure agreements from imposing obligations that are inconsistent with other statutes, principally

reinforces Section 630's other prohibitions.[9]

1. Section 630's Limits On The Information That May Be Covered By Nondisclosure Agreements Do Not Disrupt The Executive Branch.

Subsections 1 and 2 place certain discrete limits on the information that may be covered by nondisclosure agreements. Thus, subsection 2 prohibits the use of the term "classifiable," and subsection 1 provides that nondisclosure agreements may only extend to information that is (1) specifically marked as classified; (2) unmarked but known by the employee to be classified; or (3) unclassified but known by the employee to be in the process of a classification determination.

In addition, subsection 5 prohibits nondisclosure agreements from imposing obligations or invoking remedies that are inconsistent with statutory law. Although Section 630 identifies no specific statutes, the floor statement of one of its sponsors referred to the whistleblower protections of the civil service laws. 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks); *see also* 1987 Hearing at 9-10, 157-64 (Sen. Grassley & Congressional Research Service opinion). One provision of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8)(A), makes it illegal to retaliate against federal employees for publicly disclosing information that they reasonably believe evidences illegality, mismanagement, a gross waste of funds, an abuse of authority, or a substantial danger to public health and safety, provided that the information is "not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Thus, this statute, in conjunction with subsection 5, also prohibits nondisclosure

[9]Although Section 630 bans the implementation of SF 189 and SF 4193 by name, it also allows the Executive Branch to use other forms, provided that they comply with the rest of Section 630. Therefore, the ban on execution of SF 189 and SF 4193 does not disrupt the Executive Branch unless the remainder of Section 630 does so.

agreements from authorizing disciplinary action for the disclosure of information that is merely "classifiable," but not actually classified.[10]

Subsections 1 and 2 of Section 630, along with this statute, ensure that employees will not be bound by certain vague terms or held responsible for constructive, as opposed to actual, knowledge that information is subject to the agreement. 1988 House Report at 19-20. The district court held these provisions unconstitutional in all their applications, even though there is absolutely no evidence that they have any adverse effect on the Executive Branch's ability to protect national security information, let alone an effect so debilitating that it would prevent the Executive Branch from performing its constitutional functions, as *Nixon v. GSA* requires.

No plausible argument can be made that Congress lacks the authority to ban the use of the term "classifiable," especially since the same district judge who decided this case subsequently found the term "classifiable" unconstitutionally vague and banned its use unless it was narrowly defined. Motion to Affirm at 16a-20a, 23a; J.A. 61-65. It surely cannot be the law that a district court can forbid the Executive Branch from using a vague term, but Congress is constitutionally precluded by the doctrine of separation of powers from doing the same. On the contrary, Congress has expansive powers to regulate Executive Branch information, including that related to national security, and the relationship between the Executive Branch and its employees, *supra* at 22-25, and Congress is particularly well-equipped to make broad policy judgments, especially those implicating constitutional rights. *See United States v. Robel*, 389 U.S. 258, 276-77 (1967) (Brennan, J., concurring); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); A. Bickel, *The Least Dangerous Branch* 161

[10]The Civil Service Reform Act does not "authorize the withholding of [classified] information from the Congress or the taking of any personnel action against an employee who discloses [classified] information to the Congress." 5 U.S.C. § 2302(b).

(1962) (the closer the proximity of a matter to a constitutional right "the more important it is that it be decided in the first instance by the legislature").

Not only does Congress have the authority to ban the use of a vague term, but appellees have introduced no evidence substantiating a need to use the term "classifiable." Neither NSDD-84, nor the task force recommendations on which it is based, pointed to a need to protect anything other than classified information, and appellees never informed Congress of any harmful disclosures of "classifiable," as opposed to classified information. J.A. 11-14; 1983-1984 House Judiciary Comm. Hearing at 166-80; *see, e.g.*, 1987 Hearing at 88-89 (Garfinkel Testimony). Moreover, appellee Webster's affidavit, which discussed the general importance of preventing unauthorized disclosures of SCI, never mentioned the term "classifiable." J.A. 40-44. This is not surprising since the CIA nondisclosure form relied on in *Snepp v. United States*, 444 U.S. 507, 508 (1980) (per curiam), banned unauthorized disclosures of only classified, not "classifiable," information, even though the prepublication review obligations extended beyond classified information.

Furthermore, both appellees Garfinkel and Webster have now approved new agreements that delete the term "classifiable." J.A. 54, 66. In addition, appellee Garfinkel has expressly stated that his nondisclosure forms "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees, or any other laws of the United States." 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)). These steps toward compliance with subsection 2 (and subsection 5) demonstrate that full compliance will cause no harm to national security. Thus, since appellees have shown that they can fulfill their missions without resort to the term "classifiable," no purpose would be served by retaining the prerogative to reinstate the term in future forms. Similarly, if no harm has come from deleting the

term "classifiable" for current employees, who have day-to-day exposure to classified information, it is hard to imagine what harm will flow from informing former employees that the term is unenforceable.

Subsection 1, which provides that nondisclosure agreements may apply only to information that is marked classified, or that the employee knows is either classified or in the process of a classification review, also leaves the Executive Branch's mission unimpaired. The marking requirement is based on the Executive Branch's own classification scheme, which mandates that classified information be marked as such at the time of classification, Exec. Order 12,356, § 1.5, and that SCI "be distinctively marked so that individuals with authorized access to such information would be aware of its identity." 1983 Senate Hearing at 27 (Richard K. Willard, Deputy Assistant Attorney General); DCI Security Committee, *Sensitive Compartmented Information: Characteristics & Security Requirements* (June 1984) (J.A. 49); *see also* 18 U.S.C. § 798(b) (classified information must be specifically designated at the time of the violation); 50 U.S.C. § 426(1) (classified information must be clearly marked). Not only has the Executive Branch established the classification standards that are incorporated into Section 630, but Section 630 also leaves to the Executive Branch the responsibility for deciding whether particular information meets those standards. In other words, it is the Executive Branch that makes classification determinations and applies the markings that give employees notice that information is subject to the nondisclosure agreement.

In *Nixon v. GSA*, the Court found no disruption of the Executive Branch, in part, because an Executive Branch official would take control and screen the records subject to the Materials Act and would promulgate the regulations that would govern public access. Section 630's marking requirement likewise causes no disruption to the Executive Branch because it defers to the

Executive Branch's classification standards and relies on Executive Branch implementation of those standards. Thus, unlike judicial review of Freedom of Information Act denials and prepublication review determinations, and the sanctions provision of Executive Order 12,356, Section 630 does not require that information be *properly* classified before it can be covered by a nondisclosure agreement; a classification marking is all that is required. *Cf.* 5 U.S.C. § 552(b)(1) (information must be *properly* classified to be exempt from disclosure under Freedom of Information Act); *McGehee v. CIA*, 718 F.2d 1137, 1147-49 (D.C. Cir. 1983) (prepublication review may bar publication of only information that is actually and *properly* classified); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367, 1369 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (same); Exec Order 12,356, § 5.4(b)(1) (allows sanctions only for knowing or negligent disclosures of *properly* classified information).

Other aspects of subsection 1 respond to the only need expressed by the Executive Branch to go beyond marked classified information. In congressional hearings, appellee Garfinkel testified that nondisclosure agreements must be broad enough to cover oral communications of classified information (which, by their nature, are unmarked), unmarked notes from classified meetings, and information that is in the process of a classification determination. 1987 Hearing at 63, 78, 99. Thus, Section 630 allows nondisclosure agreements to cover unmarked information that the employee knows is classified and unclassified information that the employee knows is in the process of a classification determination, even though neither type of information is classified under Executive Order 12,356, which requires classification markings and limits interim classifications to thirty days only. Exec. Order 12,356, §§ 1.1(c), 1.2(e), 1.5; 1988 House Report at 10 n.36. Since the President's own Executive Order does not give the Executive Branch as much discretion as afforded by Section 630, both in terms of treating

unmarked documents as classified and in allowing sanctions for unauthorized disclosures of information that is not properly classified, *see id.* § 5.4(b)(1), there is no basis for claiming that a law providing this added leeway unconstitutionally impairs the Executive Branch.

Significantly, the Executive Branch does not argue that the categories listed in Section 630 provide insufficient protection for sensitive information. Instead, appellees contend that it is unconstitutional for Congress to require that employees must have actual knowledge that specific information is covered by a nondisclosure agreement before they may be disciplined for disclosing it. Accordingly, appellees assert that the Constitution entitles them to disregard Section 630's actual knowledge requirement in favor of a reason-to-know standard.

In support of this claim, appellees contend that Congress may not prevent the Executive Branch from holding employees liable for "[t]he careless handling of national security information." Motion to Affirm at 22. However, nothing in Section 630 specifies the standard of care that employees must exercise in handling classified information. Section 630 merely defines the information that may be covered by a nondisclosure form; presumably an employee may be held liable for the negligent or careless handling of information if it is marked classified or he or she knows that it is otherwise covered by the agreement.

Not only does Congress have the constitutional power to impose such a limitation, but it is also well-suited to making this determination. *See supra* at 32-33. Through the actual knowledge requirement, Congress sought to ensure that agencies would not resurrect the uncertainty surrounding the term "classifiable" by taking the position that employees have reason to know that unmarked information is classified or being classified unless they obtain advance permission from their superiors to disclose it. *See* 1988 Hearing at 21 (Rep. Boxer); *id.* at 67, 75-76 (Sen. Grassley); 1988 House Report at 10 n.36. Section 630's

knowledge requirement is less stringent than that in other statutes, such as the Intelligence Identities Protection Act, which imposes criminal liability for intentional disclosures of the identity of a covert agent only where the individual "know[s] that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States." 50 U.S.C. § 421 (a)-(b); *see also id.* § 421(c) (adds requirement that the intelligence relationship be classified). Moreover, Section 630 still defers to the Executive Branch for the standards controlling classification and for the decision that information should undergo a classification determination. Finally, the Executive Branch has control over briefing federal employees and marking documents so that employees will know which information falls within these nondisclosure categories.

As with its challenge to the elimination of the term "classifiable," appellees introduced no evidence that subsection 1, including its actual knowledge requirement, impairs the Executive Branch's ability to perform its constitutional functions. The Webster affidavit states only that SCI, which is required to be "distinctively marked," must be protected, but it puts forth no reason for nondisclosure agreements to reach beyond marked information. J.A. 40-44, 49. On the other hand, the only pertinent evidence undercuts any impairment claim. Thus, the National Security Council struck the term "classifiable," and inserted subsection 1 verbatim into its nondisclosure form. J.A. 59-60. If an agency as sensitive and closely tied to the President as the National Security Council can comply with subsections 1 and 2 without any harm to its mission, then it defies logic to contend that substantial harm would flow from compliance by other far less sensitive agencies, such as the Federal Maritime Commission, the Marine Mammal Commission, the Small Business Administration, and the Postal Service, which also use nondisclosure forms. 1986 GAO Report at 8.

2. Section 630's Protections of Disclosures to Congress Do Not Violate the Doctrine of Separation of Powers.

As shown above, *supra* at 22-25, Congress has substantial power to legislate in the national security area, and hence Section 630's limitations on the Executive Branch's ability to impose a prior authorization requirement on certain disclosures to Congress are facially valid. Nonetheless, the district court held these provisions unconstitutional in all their applications as a violation of separation of powers. In doing so, the court found no undue disruption as required by *Nixon v. GSA*, nor could it, given the limited nature of both the relief requested and the protections afforded by subsections 3 and 4.

The sole relief sought with respect to this aspect of Section 630 is an order directing appellees to notify all signatories of the limitations imposed by Section 630 on the enforceability of the prior authorization requirement in the nondisclosure forms. Such a notice would be essentially the same as the one that appellee Garfinkel published in the Federal Register as a final rule, stating that his nondisclosure forms do not supersede existing laws, which includes many of the laws that establish rights protected by subsections 3 and 4. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)). Since appellee Garfinkel concedes that the nondisclosure forms do not override other laws, providing this notice to all signatories would not unduly disrupt the Executive Branch, and therefore the district court's conclusion that these provisions violate separation of powers must be set aside.

In condemning subsections 3 and 4 in all their applications, the district court misunderstood the meaning of these provisions, which, by their terms, do no more than prevent nondisclosure agreements from infringing existing rights. Thus, subsection 3 prohibits nondisclosure agreements from obstructing, through a prior authorization requirement or similar restriction, "the right of any individual to petition or communicate with Members of

Congress in a secure manner as provided by the rules and procedures of the Congress." Its flipside, subsection 4, prevents nondisclosure agreements from interfering with Congress' reciprocal right to obtain Executive Branch information in a secure manner in accordance with congressional rules.

In enacting Section 630, Congress did not create new rights but only preserved the status quo pending further action by Congress or through negotiations between Congress and the Executive Branch. 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). Thus, at the hearing on renewing Section 630, Senator Grassley stressed that nondisclosure forms "must be consistent with current law," and "cannot supersede those laws that protect a government employee's right to disclose information to Congress." 1988 Hearing at 80; 1987 Hearing at 8-9 (nondisclosure forms "should in no way conflict with the current law or rights provided under the Constitution.") Therefore, he urged Congress to re-enact Section 630 in order "to preserve the right of Congressional access to executive branch information," 1988 Hearing at 80, and to prevent the Executive Branch from "restrict[ing] information that would otherwise be available to Congress." *Id.* at 49, 72; *see also id.* at 36 (Sen. Proxmire) (the nondisclosure forms "as modified may still place in jeopardy pre-existing rights of employees and Congress.") Even appellees recognize that Section 630 does not "*confer* a 'right' on an Executive Branch employee" but "take[s] as a given (and afford[s] protection to) whatever 'right' to petition or supply information to Congress that an individual might derive from some independent legal source, such as the First Amendment." Motion to Affirm at 26 (emphasis in original). Accordingly, this part of Section 630 provides only that nondisclosure forms may not require employees to seek permission before exercising a pre-existing right under the Constitution or a statute to disclose information to Congress.

Subsection 5 reinforces subsections 3 and 4 and confirms that

Congress simply preserved existing rights. Contrary to the district court's construction of subsection 5, it does not allow the Executive Branch to protect national security information only by means authorized by Congress. App. 26a-27a. Rather, it explicitly prohibits only the creation of "obligations" or "remedies" through nondisclosure agreements that are "inconsistent with statutory law." In other words, Executive Branch actions in derogation of subsection 5 are doubly forbidden because they contravene both the underlying statute and Section 630.

As an example of the pre-existing measures given added protection in subsection 5, Section 630's legislative history expressly refers to the whistleblower protection provisions of the civil service laws and in particular to 5 U.S.C. § 7211. 1988 Hearing at 5-6 (Sen. Proxmire); 1988 House Report at 20; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). That law, which was enacted in 1912, provides:

> The right of employees, either individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

Section 7211 nullified two presidential gag orders promulgated early in this century. The first, issued by President Theodore Roosevelt, forbade all federal employees, upon penalty of dismissal, from attempting to influence any legislation before Congress except through their department heads. Exec. Order of Jan. 25, 1906, *reprinted in* 48 Cong. Rec. 10,729-30 (1912). President Taft issued the second order to expand the restrictions by prohibiting federal employees from petitioning for legislation or other congressional action of any kind without the consent of their department head, and from responding to any request for information from either House of Congress, any congressional

committee, or any Member of Congress except through their department heads. Exec. Order of Nov. 26, 1910, *reprinted in* 48 Cong. Rec. 10,730 (1912). Stressing both federal employees' rights to petition Congress, and Congress' need for information held by federal employees, Congress enacted Section 7211 to overrule these orders and "to protect employees . . . in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 388, 62d Cong., 2d Sess. 7 (1912); 48 Cong. Rec. 5634-35 (1912) (Rep. Lloyd); *id.* at 4653 (Rep. Calder); *id.* at 5223 (Rep. O'Shaunessy); *id.* at 10,673-74 (Sen. Reed).

Another statute, 10 U.S.C. § 1034, which prohibits "restrict[ing] a member of the armed forces in communicating with a Member of Congress," has strikingly similar origins. It was enacted in 1951 to overrule a requirement that Navy personnel send their communications with Members of Congress through official channels on penalty of court martial, which the Navy tried to justify as a means to ensure that Navy personnel would not lobby on Navy-related legislation. 97 Cong. Rec. 3776 (1951); *see Brown v. Glines*, 444 U.S. 348, 358-59 (1980). Initially, the statute had an exception for classified information, but a recent amendment has eliminated that exception and provided added protection to disclosures about fraud, waste, illegal conduct, and public health and safety matters. Pub. L. No. 100-456, § 846, 100th Cong., 2d Sess. (Oct. 29, 1988).

Few cases have construed the rights protected under Sections 7211 or 1034. Thus, although no cases have addressed the extent to which Section 7211 creates rights beyond those embodied in the First Amendment, it is clear that, at a minimum, it ensures federal employees the same First Amendment rights enjoyed by others, *see Bush v. Lucas*, 462 U.S. at 384 & n.24, and Section 1034 most likely affords greater protection. *See Brown v. Glines*, 444 U.S. at 359-61. In any event, the history of these sections demonstrates that they prohibit imposing a prior authorization requirement on the exercise of whatever rights they protect,

which Section 630 reinforces and extends to nondisclosure forms.

Subsection 4, which prevents nondisclosure forms from imposing limitations on Congress' rights to obtain information, also protects rights that derive from sources other than Section 630. Thus, it has long been recognized that Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," which, of course, includes a vast array of national security matters. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). As this Court has confirmed, Congress' power of inquiry is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," *Barenblatt v. United States*, 360 U.S. 109, 111 (1959), and encompasses "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes [and] . . . probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

The power of impeachment also gives the House of Representatives "the right to investigate the conduct of all public officers under the Government.. . . [and] would penetrate into the most secret recesses of the Executive Departments" and extend to "all papers, public or private, official or unofficial." IV J. Richardson, *A Compilation of the Messages & Papers of the Presidents* 1787-1897, at 431, 434 (1899) (Statement of President Polk, April 20, 1846). Thus, when President Washington refused to provide the House negotiating records pertaining to the Jay Treaty, he made it clear that he would provide such records if the House requested them for an impeachment investigation. I J. Richardson, *supra*, at 194-95 (Statement of March 30, 1796).

Since the President possesses more extensive sources of information than Congress regarding both domestic and foreign

affairs, "[t]here is great wisdom, therefore, in not merely allowing, but in requiring, the president to lay before congress all facts and information which may assist their deliberations . . .." 3 J. Story, *Commentaries on the Constitution of the United States*, § 1555 (1905). In keeping with this sentiment, presidents have generally provided complete information to Congress ever since President Washington's full disclosure in response to the House of Representatives' first request for records in 1792 pertaining to the failed St. Clair expedition. A. Schiesinger, *The Imperial Presidency* 16, 43-49 (1973); Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, §§ II & IV, __ Wm. & Mary L. Rev. __ (1988) (lodged with the Court in *United States v. Mistretta & Mistretta v. United States*, Nos. 87-1904 & 87-7028).

As a result, Congress has come to depend on a wide range of information to carry out its legislative, budget, and oversight responsibilities. Federal employees fill in the gaps in the "often one-sided and self-serving" information voluntarily provided by the Executive Branch by "direct[ing] Congress to a problematic aspect of what may be an otherwise impenetrable subject matter, which is what happened with disclosures about [problems with] the B-1 Bomber and MX missiles," faulty and overpriced weapons and spare parts, and "reservists remaining in Central America for tours that exceeded the legal time limit on such stays." J.A. 35 (Affidavit of Rep. Boxer); *see also* 1988 Hearings at 19-20 (Rep. Boxer) ($7600 coffee brewers, $300 "No Smoking" sign, $600 armrest on C-5 cargo plane, adequacy of testing of Bradley Fighting Vehicle, problems with inventory supply system in Europe, payments to Naval Reserve Officers for training missions they never flew); *id.* at 6, 12 (Sen. Proxmire) ($2 billion cost overrun in C-5A cargo aircraft).

Contrary to the district court's views, App. 26a, nothing in the Constitution requires Congress to use a subpoena as the sole means of obtaining Executive Branch information. In fact, the

subpoena power is not even listed in the Constitution, but has been implied to enable Congress to compel the Executive Branch to provide Congress information that it needs to perform its constitutional functions, when voluntary requests prove insufficient. *See McGrain*, 273 U.S. at 161, 173-74. Thus, just as no one would suggest that Congress cannot make requests for information without issuing a subpoena, so too the subpoena power does not constitutionally bar Congress from passing laws that protect its access to information through other means, as it has often done in mandatory reporting requirements, such as the Intelligence Oversight Act, 50 U.S.C. §§ 413-415. *See In re Chapman*, 166 U.S. 661 (1896) (Congress has inherent power to punish by contempt refusals to provide information but can also pass a statute making such actions a misdemeanor); *Sinclair v. United States*, 279 U.S. 263 (1929) (2 U.S.C. § 192 applies to voluntary appearances as well as to those pursuant to subpoena); *see also* 18 U.S.C. § 1505 (making it a crime to impede a congressional investigation). This makes eminent sense since, as appellant Boxer observed, "[s]ubpoenas place the executive and legislative branches at loggerheads and thus heighten the adversarial rather than the cooperative aspects of the relationship, which is counterproductive in the long run." J.A. 35.

By protecting these rights of Congress and federal employees, Section 630 does not, as the district court concluded, "depart[] from history and threaten[] the balance struck by time." App. 26a. Instead, it prevents the Executive Branch from unilaterally upsetting the status quo through nondisclosure forms. Thus, Section 630 prevents nondisclosure forms from impeding the exercise of existing rights, but has no effect on the Executive Branch's power to punish whatever unauthorized disclosures of information to Congress that it previously could have punished.

Accordingly, subsections 3 and 4 can be unconstitutional only if the current scheme creates the kind of impediment required by *Nixon v. GSA*. Yet both appellees and the district court are silent

as to any shortcomings in the underlying statutes and rights that are necessarily invalidated by the district court's ruling. Neither NSDD-84 nor the task force report identified any need to depart from the historic practice and restrict disclosures to Congress through a prior authorization requirement. Nor does Executive Order 12,356 call for such a limitation. Instead, it provides only that "[c]lassified information shall not be disseminated outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch." Exec. Order 12,356, § 4.1(c). Section 630 contains a similar limitation by requiring that disclosures be made in a secure manner as provided by congressional rules and procedures, which appellees have never claimed afford inadequate protection.[11]

Not only is there no evidence that subsections 3 and 4 impair the Executive Branch, but even appellees' assertion of such an impairment is grossly misplaced since appellants invoked these provisions only as part of their request for notification to signatories that Section 630 prevents the Executive Branch from enforcing certain terms in the nondisclosure forms, including those identified in subsections 3 and 4, during the funding ban. Their request does not require the Court to pass on the extent of employees' underlying rights to give information to Congress without seeking prior permission from their superiors, but only to ensure that employees know that the forms do not alter those rights. Moreover, appellee Garfinkel has disavowed any intent to displace existing laws through the nondisclosure forms in his most recent regulation, which expressly states that SF 189 and his newest form "do not supersede . . . any other laws of the United States." 53 Fed. Reg. at 38,279 (to be codified at 32

[11]To assure proper security, the Senate has established strict controls for classified information, including restrictions on unauthorized disclosures, and many committees, including the intelligence committees of both Houses, have long operated under similar rules. Office of Senate Security, *Senate Security Manual* (Oct. 1988); *see, e.g.*, S. Res. 400, 94th Cong., 2d Sess. (1976); H. Res. 658, 95th Cong., 1st Sess. (1977).

C.F.R. § 2003.20(g)). Since at least one of the appellees thereby concedes that statutory rights, including Sections 7211 and 1034 which protect employees' rights to communicate with Congress, are unaffected by the nondisclosure agreements, it would hardly impair the Executive Branch to inform all signatories to the forms of that limitation.

Nonetheless, in response to this rather modest request for relief, appellees have claimed that it is unconstitutional for Congress to control in any way the limitations that the Executive Branch has sought to impose on employees who wish to make disclosures of information to Congress. In particular, appellees contend that Congress cannot stop them from requiring three million employees to seek prior authorization before making *any* disclosure of classified or "classifiable" information to Congress, even where that requirement violates some other law or right. However, requiring employees to identify themselves as likely whistleblowers by seeking such permission, especially where their superiors have improperly classified information to conceal government waste or illegal conduct, will almost certainly curtail the exercise of existing rights to communicate with Members of Congress. *See Talley v. California*, 362 U.S. 60, 64-65 (1960) (confidentiality required to avoid curtailing speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (same); 5 U.S.C. § 1206(b)(1) (preserving confidentiality of whistleblowers).

The sheer breadth of the Executive Branch's claim of power threatens the balance struck by history, under which Members of Congress have been considered to be both cleared and authorized by virtue of their elected positions to receive classified information. It is also an attack on numerous statutes and time-honored rights of Congress to obtain Executive Branch information, as well as on Congress' authority to provide for greater protections than afforded by the Constitution. *See Brown v. Glines*, 444 U.S. at 358-61 (although prior authorization requirement for solicita-

tion activities did not constitute unlawful prior restraint, Court looked to 10 U.S.C. § 1034 for further safeguards which it found applied to individual communications with Congress but not collective petitions). Neither appellees nor the district court cited any case upholding such a sweeping claim, and the authorities on which they rely offer no support for a constitutional bar to statutes, like Section 630, which regulate Executive Branch restrictions on congressional access to national security information.

Because the Executive Branch has provided absolutely no factual support for its broad claim of impairment, the Court should decline, as it did in *Nixon v. GSA*, to decide whether some hypothetical application of the statute might conceivably raise a constitutional question. 433 U.S. at 434-35, 438, 444-45. It would be particularly inappropriate for the Court to delimit the parameters of the rights protected by Section 630 here because this case does not concern a specific disclosure made by a federal employee to a Member of Congress. *See Barenblatt v. United States*, 360 U.S. at 112 ("[t]he congressional power of inquiry, its range and scope, and an individual's duty in relation to it . . . are to be judged in the concrete, not on the basis of abstractions"); *see also* Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1427-29 (1974) (highlighting political sensitivity and unseemliness of courts deciding whether Congress needs access to Executive Branch information and whether congressional disclosure will create a security risk). Rather than decide the respective rights of Congress and the Executive Branch in a vacuum, the Court should leave resolution of future disputes to political negotiations between the branches or to judicial determinations in concrete settings where political accommodation does not fully resolve the conflict. *See United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976) (court urged negotiated solution to clash between Congress and Executive over Congress' access to documents pertaining to warrantless wiretaps);

United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (on remand court prescribed compromise procedure which facilitated settlement). All the Court needs to decide here is that the district court erred in its blanket condemnation of subsections 3 and 4 and that a notice of the type requested by appellants would not unduly hamper the Executive Branch's ability to function.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and remand the case with directions for the district court to issue an order requiring appellees to give federal employees notice of Section 630's restrictions and grant such other relief as is necessary and proper to remedy appellees' noncompliance.

Respectfully submitted,

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ADDENDUM

Section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (1988), which is identical to Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-432 (1987), except for the year in which it is in effect, provides:

> No funds appropriated in this or any other Act for fiscal year 1989 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5 imposes any obligations or invokes any remedies inconsistent with statutory law:

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.